BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLETUS WYLAND	)	
Claimant	)	
V.	)	
	)	
STAFFMARK	)	Docket No. 1,056,492
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent) requested review of Administrative Law Judge Kenneth J. Hursh's March 20, 2014 Award. The Board heard oral argument on July 15, 2014.

APPEARANCES

Steffanie L. Stracke of Kansas City, Missouri, appeared for claimant. Edward D. Heath, Jr., of Wichita appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

ISSUES

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment on August 25, 2010. Only the nature and extent of claimant's disability was disputed. The judge awarded permanent total disability benefits.

Respondent argues claimant is not permanently and totally disabled and should be limited to permanent partial disability benefits based on between a 94% work disability and a 97% work disability award. Respondent contends claimant can work and he is not credible. Respondent also asserts the judge may have improperly calculated a credit for preexisting impairment. Claimant maintains the Award should be affirmed. Claimant asserts the evidence supports a finding of permanent total disability. Further, claimant contends his credibility issues do not impact the nature and extent of his disability.

The Board's review only concerns the nature and extent of claimant's disability, including respondent's credit for preexisting impairment.

FINDINGS OF FACT

This matter concerns an August 25, 2010 low back injury. Claimant had prior injuries. From 2003 to 2006, claimant was unemployed following a work-related right shoulder injury in New York which required two surgeries. Claimant testified he believed he also had a low back injury in New York in 2006. Claimant denied having any leg symptoms due to this prior back injury. Following physical therapy, pain management and pain medication, he settled his prior claims. He then moved to Florida, but continued receiving pain management. In August 2009, claimant moved to Gardner, Kansas. He was on Oxycodone at the time and sought pain management treatment with Kevin Punswick, D.O. It appears Dr. Punswick referred claimant to an Olathe Medical Center doctor for pain medication. Dr. Punswick recommended low back surgery at an unknown time in 2009. Dr. Punswick last evaluated claimant in November 2009.

In August 2010, claimant was hired by respondent, a temporary employment agency, and placed with Coleman Camping Supplies Distribution Center. His job duties consisted of receiving orders, pulling merchandise and preparing it for shipping.

On August 25, 2010, claimant was stacking pallets weighing approximately 50 pounds each. He lifted one of the wooden pallets and experienced an immediate onset of low back pain. He had worked for respondent for less than a week when he was injured. Claimant reported the incident to his supervisor and was initially referred to Concentra, and later to John Ciccarelli, M.D.[1] In terms of divulging his prior history, claimant acknowledged only telling Dr. Kagan at Concentra and Dr. Ciccarelli that he had an injury to his low back that had occurred 17 years prior while bowling. Conservative treatment consisting of physical therapy and injections failed to provide claimant relief.

On October 26, 2011, the judge issued a preliminary hearing Order for medical treatment for claimant with Frank P. Holladay, M.D.

A preliminary hearing occurred on February 22, 2012. Claimant wanted additional medical treatment, while respondent contended claimant's benefits should be suspended based on refusal or obstruction of medical treatment. The judge noted that Dr. Laughlin, who was an authorized physician, withdrew from treating claimant based on claimant's drug seeking behavior. The judge further noted Dr. Holladay withdrew from treating claimant after learning claimant had forged prescriptions.[2] The judge ordered respondent to provide claimant a list of three physicians from which he could select authorized treatment, assuming any of the three doctors would voluntarily treat claimant.

---

[1] R.H. Trans. at 28-29.

[2] Claimant testified he pled guilty to a crime involving dishonesty. (*Id.* at 38). The date of the offense and the legal name of the offense are not in the record. Claimant testified he "made a mistake and tried altering the dosage of the medication." (*Id.*).

Claimant eventually came under the treatment of Harold Hess, M.D., a board certified neurosurgeon. Dr. Hess performed a lumbar fusion on claimant on July 17, 2012. Following surgery, claimant continued to experience low back pain. Dr. Hess believed it was impossible to wean him off narcotic medication. Dr. Hess referred claimant to Steven Simon, M.D., for chronic pain management.

Claimant underwent a Functional Capacity Evaluation (FCE) which showed he could do light demand work. On April 4, 2013, claimant was released by Dr. Hess with permanent work restrictions of lifting up to 20 pounds occasionally, up to 10 pounds frequently and no weight constantly, as well as the need to frequently alternate positions. Dr. Hess opined claimant could return to work within these restrictions, but acknowledged claimant would not be well suited for even a sedentary job that would not "allow him to be able to get up, walk around, take a break, that type of thing."[3] Dr. Hess further stated:

> The one thing I would qualify that is if he continues to be under Dr. Simon and chronic pain management, then assuming at least the last time I saw him he was still on narcotics, he could function in a job where he would not put himself at risk taking narcotics and he could also - - would need somebody to drive him.[4]

Dr. Hess assigned claimant a 25% whole body impairment pursuant to the AMA *Guides* (hereafter *Guides*).[5] Such rating did not account for any preexisting impairment. Strictly looking at a list of 16 pre-injury tasks compiled by Michael Dreiling,[6] Dr. Hess opined claimant was unable to perform 14 for an 88% task loss. Dr. Hess did not review Mr. Dreiling's vocational assessment, just the task list.

On June 14, 2013, claimant was seen at his attorney's request by James Stuckmeyer, M.D., a board certified orthopedic surgeon. Claimant complained of continued low back pain with pain radiating into his lower extremities. Physical examination revealed range of motion deficits, positive straight leg raising with no radiculopathy and no sensory deficit or antalgic gait.

At the time claimant was evaluated by Dr. Stuckmeyer, claimant was working at Olathe RV as a mechanic. Dr. Stuckmeyer's report, dated June 15, 2013, stated claimant "informed this examiner that he has not worked since August 25, 2010."[7]

---

[3] Hess Depo. at 17.

[4] *Id.* at 9.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[6] Claimant was interviewed by Michael Dreiling, a vocational consultant, on August 22, 2013.

[7] Stuckmeyer Depo., Ex. 2 at 7.

Dr. Stuckmeyer assigned a 25% whole body impairment pursuant to the *Guides*, with 10% impairment being preexisting and 15% impairment due to the August 25, 2010 accidental injury. Dr. Stuckmeyer provided permanent restrictions of no prolonged standing or walking greater than tolerated, no repetitive lifting, bending or twisting, and no lifting to exceed 10-15 pounds to waist level. Due to claimant's significant use of narcotic medication, Dr. Stuckmeyer also provided restrictions of no commercial driving and no driving of a personal vehicle, as well as no working around hazardous equipment, working at heights or in a position of authority. While Dr. Stuckmeyer recommended every attempt be made to wean claimant off narcotic medication, he stated:

> [T]he forwarded medical records would reflect that it appears that dating back all the way to 2006, [claimant] has been using opioid medications, and in this examiner's opinion, the likelihood of successful weaning form [sic] the narcotic medication is relatively unlikely.[8]

Dr. Stuckmeyer differentiated claimant's preexisting condition from the injury sustained on August 25, 2010. He noted claimant's prior condition involved injury at L4-5, whereas the current injury involved L5-S1.[9] Dr. Stuckmeyer also noted claimant's current injury caused development of severe radiating pain into his bilateral legs.

Dr. Stuckmeyer subsequently received Mr. Dreiling's September 11, 2013 report and task list. Mr. Dreiling's report stated claimant performed some light mechanic work at Olathe RV in June and July 2013, but discontinued such work because he was physically unable to tolerate the work. With knowledge of claimant's work at Olathe RV, Dr. Stuckmeyer opined in his October 2, 2013 letter to claimant's counsel that claimant was unable to perform 15 of the 16 tasks identified by Mr. Dreiling for a 94% task loss. Additionally, Dr. Stuckmeyer opined claimant is "permanently and totally disabled."[10]

Mr. Dreiling testified on January 22, 2014. Based on claimant's restrictions, Mr. Dreiling testified, "he will probably not have the ability to go back to perform the majority of the tasks that he had done over the 15 years."[11]

Claimant was 49 years old at the time of the regular hearing. He is a high school graduate. His past employment consisted of working as an auto mechanic, a union plasterer and briefly as a sales clerk/stocker for an auto parts store. For two years he was a construction supervisor, which involved less physical duties than as a union plasterer.

---

[8] *Id*., Ex. 2 at 9.

[9] See *Id*. at 6, 38.

[10] *Id*., Ex. 3 at 2; see also *Id*. at 18.

[11] Dreiling Depo. at 19.

Claimant worked as a recreational vehicle mechanic from May 15 to July 16, 2013 earning $15 an hour. He changed oil, did brake jobs and changed tires, as well as diagnosed and repaired recreational vehicles. Claimant testified he voluntarily left this employment because the work caused him too much pain. Claimant has performed no other work since the injury. He testified that he definitely could not do his past work.

Claimant currently experiences a constant burning, aching pain in his lower back which increases with activity. While never pain free, claimant testified his lowest pain level has been a 4 on a 0-10 pain scale, but most days his pain is a 7. He complains of bilateral leg pain and numbness. He currently takes Opana and Oxycodone (pain medication), Soma (muscle relaxer), Gralaise for nerve pain, Cymbalta, in addition to Flomax, which he believed was related to his work injury. Claimant testified his medications affect his concentration and focus. Claimant testified he wakes up at least once if not twice a night because of discomfort and pain.

The March 20, 2014 Award states, in relevant part:

> **Nature and extent of disability.** The main issue in the case was whether the work injury has left the claimant permanently totally disabled or permanently partially disabled with a general "work" disability, and also whether the respondent is entitled to a credit for preexisting functional impairment.
>
> The claimant injured his low back August 25, 2010 from lifting pallets. He experienced back pain and pain down both legs following this incident. The claimant had low back symptoms prior to the work accident and in 2009 settled a workers compensation claim for a back injury he suffered while working in New York.
>
> Dr. Hess diagnosed disc protrusions at L3-L4 and L5-S1. Hess did not want to perform fusion surgery on two separated levels, nor did he think fusion of the three levels, including L4-L5 was indicated. By discogram, Dr. Hess isolated L5-S1 as the claimant's pain generator and performed fusion surgery at that level. The claimant did not experience much, if any, relief of symptoms from the procedure. Dr. Hess said the claimant is now capable of light work as defined by the U.S. Department of Labor, but also that the claimant would need a type of work where the claimant's ongoing use of narcotics would not be a risk. Hess also noted the claimant should not drive because of his ongoing use of narcotics prescribed by Dr. Simon. Reviewing the claimant's 15 year work task history as compiled by vocational expert, Michael Dreiling, Dr. Hess said the claimant has lost the ability to perform 14 of the 16 enumerated tasks. The two tasks Dr. Hess said the claimant retains the ability to perform were essentially paperwork tasks, ordering materials and supplies, and maintaining time and attendance records.
>
> The claimant offered testimony from Dr. Stuckmeyer, who examined the claimant on June 14, 2013. Stuckmeyer testified the claimant has permanent work restrictions of no lifting over 15 pounds as well as limitations on lifting, bending,

twisting, and should not be driving with the narcotic medications. The doctor said the claimant has lost the ability to perform 15 of the 16 tasks in the claimant's work task history. Also, considering the nature of the claimant's injury and the claimant's ongoing use of narcotics, Dr. Stuckmeyer felt the claimant is permanently totally disabled. Both physicians rated the claimant's permanent functional impairment at 25% of the whole person from the AMA *Guides to the Evaluation of Permanent Impairment*, 4th Edition's Diagnosis Related Estimates Category V. Dr. Stuckmeyer said the claimant had 10% preexisting functional impairment from his prior low back condition.

The claimant testified he has worked as an auto mechanic, as a union plasterer, and briefly as a sales clerk/stocker for an auto parts store. For two years he was a construction supervisor which involved less physical duties than as a union plasterer. He had worked only a few days for the respondent as a temporary laborer when the injury occurred. Following the injury, the claimant worked as a recreational vehicle mechanic, but said he left the job after two months because the work caused him too much pain. That was the only work the claimant has performed since the injury.

The claimant contended there is a presumption of permanent total disability under K.S.A. 44-510c. That section's presumption applied in cases of injury to multiple scheduled members, total paralysis, or incurable insanity or imbecility, none of which are the case here. Permanent total disability, according to K.S.A. 44-510c, is when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. As mentioned, Dr. Stuckmeyer said the claimant is permanently totally disabled on account of the injury.

The respondent argued Dr. Hess' opinion proved the claimant is capable of some type of work, and that the vocational expert, Michael Dreiling did not state the claimant is unemployable. Dreiling wasn't asked about the claimant's employability and did not comment on it one way or the other. Dr. Hess did say the claimant's functional capacity evaluation showed the ability for light work. The claimant is a high school graduate with no other education or vocational training. His primary work experience in construction and auto mechanics is not light work. He would have to find light employment in a new field with the added limitation that it is work that could be performed effectively and safely despite narcotic drug use. Furthermore, the claimant would not be able to drive himself to work.

Looking at all the circumstances, here, the claimant is incapable of substantial and gainful employment and that condition is permanent as long as he is on a narcotic medication regimen. Now, three-and-a-half years after the injury, the claimant still requires narcotic medication and there was no indication in the record the medication regimen will change. It is held the claimant is permanently totally disabled.

> It is also held the claimant had a 10% preexisting functional impairment. The respondent would be entitled to a credit for that amount according to K.S.A. 44-501(c). The credit shall be computed as the dollar amount of a ten percent permanent partial disability based on 415 weeks of benefits, the method used in *Payne v. The Boeing Co.*, W.C.A.B. 1,007,073 & 1,020,332 (2007). The credit shall be 41.5 x $240 = $9,960.00.

Respondent filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment.[12] The burden of proof – that a party's position on an issue is more probably true than not true – is on claimant.[13]

K.S.A. 44-510c(a)(2) states, in pertinent part:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

Permanent total disability is determined under the totality of the circumstances and consideration of all of the evidence.[14] A finding that a worker is essentially and realistically unemployable is consistent with a worker being permanently and totally disabled.[15]

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[16]

"The risk of employing a workman with a preexisting disability is upon the employer, and when a workman who is not in sound health is accepted for employment and a subsequent industrial accident suffered by him aggravates or accelerates the condition, resulting in disability, he is entitled to be fully compensated for the resultant disability."[17]

---

[12] K.S.A. 2010 Supp. 44-501(a).

[13] K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

[14] See *Adams v. Ball's Food Stores*, 41 Kan. App. 2d 799, 803, 207 P.3d 261 (2008).

[15] See *Wardlow v. ANR Freight Sys.*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[16] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146 (1976).

[17] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 202, 547 P.2d 751 (1976).

ANALYSIS

Claimant has credibility concerns. He came to Kansas with an injured low back as the result of a workers compensation claim originating in New York in 2006. Claimant was still taking narcotics for his low back pain when he moved to Gardner. Dr. Punswick recommended low back surgery in 2009. Claimant was not forthright about his preexisting condition to Dr. Kagan and Dr. Ciccarelli, only noting a bowling injury from 17 years prior, but telling them nothing about his 2006 low back injury or his ongoing treatment with Dr. Punswick or a pain management doctor at Olathe Medical Center. Claimant altered a prescription and testified he pled guilty to a crime involving dishonesty. Claimant's drug seeking behavior caused two authorized physicians to withdraw from providing treatment. Further, claimant did not tell Dr. Stuckmeyer that he was working at Olathe RV, at a time when he was so employed.[18]

Despite these glaring problems, it is uncontradicted claimant's admittedly compensable August 25, 2010 accidental injury resulted in increased symptoms necessitating a lumbar fusion. In a pre-May 15, 2011 case, all claimant would need to prove was an aggravation, acceleration or intensification of a preexisting condition, but claimant proved more than a simple aggravation of a preexisting lumbar condition: Dr. Stuckmeyer's testimony suggests the August 25, 2010 accident resulted in a new injury at L5-S1, new symptom of bilateral leg pain and the need for a lumbar fusion.

There is no evidence, including no physician testimony, that claimant's lumbar injury was only a temporary exacerbation of a preexisting condition. No physician doubted the legitimacy of claimant's increased impairment and disability as a result of the August 25, 2010 accidental injury. While claimant certainly had a 10% preexisting functional impairment due to his low back condition, there is no evidence to show claimant's current level of impairment and disability were simply a continuation of the same injury he had in New York.

Moreover, claimant's credibility does not diminish the fact his worsened back condition led to increased pain, new leg symptoms, a spinal fusion, increased narcotic medication usage, a physician recommending he not drive due to such drug use, self-reported cognitive dysfunction, light duty work restrictions and the inability to perform between 88% and 94% of the tasks he performed in the 15 years before his accidental injury, most of which involved physical work. The Board concludes the greater weight of the evidence demonstrates claimant is permanently and totally disabled. The Board agrees with the judge that claimant is incapable of substantial and gainful employment.

---

[18] The fact claimant told Mr. Dreiling on August 22, 2013, that he was working at Olathe RV does not diminish the fact that claimant did not tell Dr. Stuckmeyer that he was working at a time when he was working.

Respondent's petition for review, which was filed on May 2, 2014, did not seek review of the judge's determination of a credit for claimant's preexisting impairment. On May 9, 2014, the Kansas Court of Appeals issued a published decision, *Ward*.[19] The *Ward* case includes a methodology to calculate a preexisting impairment credit from a permanent partial disability award. In respondent's brief, which was filed on May 14, 2014, respondent specifically noted no disagreement as to the judge's findings concerning claimant's preexisting impairment. Respondent's brief did not contest the calculation of the credit.

While the Board ordinarily only hears issues first presented to the judge, *Ward* had not been decided until after the judge's Award. Claimant voiced no objection to the Board addressing whether *Ward* impacts determination of respondent's credit in this case. The Board concludes the judge properly calculated the preexisting impairment credit under *Payne*.[20] The *Payne* decision specifically addresses how to compute a credit for preexisting impairment in a permanent total disability case. *Ward* applies to permanent partial disability cases. There is nothing in *Ward* to suggest the *Payne* methodology to deduct a preexisting impairment credit in a permanent total disability has been altered.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes:

- claimant is permanently and totally disabled based upon K.S.A. 44-510c, the totality of the circumstances and because he is essentially and realistically precluded from substantial and gainful employment; and

- the Award used the proper methodology to calculate respondent's credit for claimant's preexisting impairment.

AWARD

WHEREFORE, the Board affirms the March 20, 2014 Award.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

---

[19] *Ward v. Allen Cnty. Hosp.*, 50 Kan. App. 2d ___, 324 P.3d 1122 (2014).

[20] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

ec: Steffanie L. Stracke
sstracke@etkclaw.com

Edward D. Heath, Jr.
heathlaw@swbell.net

Honorable Kenneth J. Hursh